QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2019 SKQB 135**

Date: **2019 05 27**
Docket: CRM 34 of 2014
Judicial Centre: Prince Albert

BETWEEN:

CURTIS VEY and ANGELA NICHOLSON

APPLICANTS

- and -

HER MAJESTY THE QUEEN

RESPONDENT

RESTRICTION ON PUBLICATION: By court order made under subsection 517(1) of the *Criminal Code*, these reasons shall not be published in any document, or broadcast or transmitted in any way until the end of the trial.

Counsel:

Lori O'Connor	for the Crown
Aaron A. Fox Q.C. and Darren K. Kraushaar	for Curtis Vey
Ronald Piché	for Angela Nicholson

JUDGMENT
MAY 27, 2019

DAWSON J.

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[1] Angela Nicholson and Curtis Vey stand charged in a joint Indictment that:

> Count 1: THAT THEY, the said **ANGELA NICHOLSON AND CURTIS VEY**, on or about the 1st day of July A.D., 2013 at or near

Wakaw, in the Province of Saskatchewan, did conspire together to murder Jim Taylor contrary to Section 465(1)(a) of the Criminal Code.

Count 2: THAT THEY, the said **ANGELA NICHOLSON AND CURTIS VEY**, on or about the 1st day of July A.D., 2013 at or near Wakaw, in the Province of Saskatchewan, did conspire together to murder Brigitte Vey contrary to Section 465(1)(a) of the Criminal Code.

[2] Curtis Vey has brought the following application:

1. An Order finding that the Applicant's Section 8 *Charter* right against unreasonable search and seizure have been breached;

2. An Order finding that the Applicant's Section 9 *Charter* right against arbitrary detention and arrest have been breached;

3. An Order for the exclusion of any direct, as well as, derivative evidence obtained by the police as a result of the above breaches of the Applicant's *Charter*-protected rights, including but not limited to: a) the surreptitiously-obtained recording of the Applicant and b) any additional statements and recordings of the Applicant made by police obtained as a obtained as a [*sic*] result of the unlawful search and seizure.

[3] Angela Nicholson has brought the following application:

1. An order finding that the Applicant's Section 8 *Charter* right to be free from unreasonable search and seizure has been breached;

2. An order finding that the Applicant's Section 9 *Charter* right to be free from arbitrary arrest or detention has been breached;

3. An order for the exclusion of any direct, as well as, derivative evidence obtained by the police as a result of the above breaches of the Applicant's *Charter* protected

> rights, including but not limited to: a) the surreptitiously-obtained iPod recording of the Applicant and b) any additional statements and recordings of the Applicant made by police obtained as a result of the unlawful search and seizure.

BACKGROUND LAW ON SECTION 8 OF THE *CHARTER*

[4] Section 8 of the *Canadian Charter of Rights and Freedoms* [*Charter*] states:

> Search or seizure
>
> **8.** Everyone has the right to be secure against unreasonable search or seizure.

[5] The *Charter* entrenched in the Canadian Constitution is the right to be secure against unreasonable search and seizure. The *Charter*, however, only applies to agents of the state and this protection is applicable only with respect to governmental actions. In interpreting this right, Canadian courts have been called upon to make two fundamental determinations: 1) has a search or seizure taken place? and 2) if so, is that search or seizure reasonable?

[6] In *Hunter v Southam Inc.*, [1984] 2 SCR 145, Justice Dickson (as he then was) set out the underlying framework which governs the interpretation and delineation of s. 8 of the *Charter* by the courts:

> ... the guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by section 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's

> privacy in order to advance its goals, notably those of law enforcement. [pps. 159-160] [Emphasis in original]

[7] The purpose of s. 8 is to protect against intrusion of the state on an individual's privacy. The limits on state action are determined by balancing the right of citizens to a reasonable expectation of privacy against the state interest in law enforcement. Section 8 protects people, and not property, and it is, therefore, unnecessary to establish a proprietary interest in the thing seized. A search will therefore have been found to have taken place if the state's action has infringed on an individual's reasonable expectation of privacy. (James A. Fontana & David Keeshan, *The Law of Search and Seizure in Canada*, 10th ed (LexisNexis, Canada, 2017) [*Fontana and Keeshan*])

[8] In 1987, the Supreme Court of Canada in *R v Collins*, [1987] 1 SCR 265 held that in order for a search to be reasonable:

1. A search must be authorized by law;

2. The law itself must be reasonable; and

3. The search must be carried out in a reasonable manner.

[9] The authorization by law may refer to a specific legislative enactment, such as a search warrant, or specific provisions of the *Criminal Code*, RSC 1985, c C-46, or to a power granted to authorities under the common law.

[10] Where a search is warrantless, it is presumptively unreasonable. The Crown bears the burden of demonstrating, on the balance of probabilities,

that a warrantless search was authorized by a reasonable law and carried out in a reasonable manner (*R v Dedman*, [1985] 2 SCR 2 at 35).

[11] If a search has been found to be unreasonable, s. 24(2) of the *Charter* will come into play. Section 24 states:

> **Enforcement of guaranteed rights and freedoms**
>
> **24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> **Exclusion of evidence bringing administration of justice into disrepute**
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[12] The Supreme Court in *R v Grant*, 2009 SCC 32, [2009] SCR 353 [*Grant*] articulated a framework for determining whether evidence obtained in breach of the *Charter* rights must be excluded under s. 24(2). Three avenues of inquiry are set out to guide courts going forward: 1) the seriousness of the *Charter* infringing state conduct; 2) the impact of the breach on the *Charter* protected interests of the accused; and 3) society's interest in the adjudication of the case on its merits.

[13] The question of what constitutes a search or seizure is important, since the protection afforded by s. 8 of the *Charter* applies only to that intrusive conduct by law enforcement authorities that can be said to amount to a search or seizure. It is clear that the answer to this question depends on

whether an individual's reasonable expectation of privacy has been engaged and infringed (*Fontana and Keeshan*). If it has, then a s. 8 search or seizure has occurred. In *R v Evans*, [1996] 1 SCR 8, Justice Sopinka stated that s. 8 of the *Charter* only comes into play where a person's reasonable expectation of privacy is diminished by an investigatory technique.

[14] Whether or not specific conduct constitutes a search or seizure is an issue requiring specific examination in each case, particularly where complicating factors such as the enlistment of third-party assistance or the exportation of new technologies are involved. As stated by *Fontana and Keeshan*, it is the individual's expectation of privacy in the face of governmental encroachments, rather than the defence of property interests, that lies at the heart of the protection against unreasonable search and seizure.

[15] Although not overtly protected by the *Charter*, privacy is the cornerstone right against which search and seizure law must be measured. The expectation of privacy must be reasonable. That is, an expectation which society would be prepared to recognize as reasonable. An expectation by an individual that he/she will escape detection by the police or be free from interference by the public, by reason of precautions he/she has taken, does not of itself constitute a reasonable expectation of privacy. The nature of the privacy interest does not depend on whether, in the particular case, privacy shelters legal or illegal activity. The analysis turns on the privacy of the area or the thing being searched and the impact of the search on its target, not on the legal or illegal nature of the items sought.

[16] There is also fundamental difference between a person's reasonable expectation of privacy in his or her dealings with the state and the

same person's reasonable expectation of privacy in dealing with ordinary citizens (*Aubry v Éditions Vice-Versa inc.*, [1998] 1 SCR 591). As the Supreme Court said in *R v Wong*, [1990] 3 SCR 36 [*Wong*], it would be an error to equate the risk of having one's words overheard with the risk of having the state, at its sole discretion, make a permanent electronic recording of those words.

[17] Reasonable expectation of privacy has therefore emerged as the cornerstone test of the search and seizure process. Its importance may be seen in this way: conduct by agents of the state may, in practical terms, amount to a search and seizure, but it will not be viewed as conduct subject to constitutional scrutiny under s. 8 of the *Charter*, unless a reasonable expectation of privacy has been violated. It is well established that it is the claimant who bears the burden of demonstrating this expectation of privacy on a balance of probabilities: *R v Edwards*, [1996] 1 SCR 128 [*Edwards*].

The Supreme Court of Canada decision in *Edwards* makes it clear that whether or not a reasonable expectation of privacy exists must be determined on a totality of the circumstances. More recently, the Supreme Court has grouped the factors enunciated in *Edwards* under the following headings: 1) the subject matter of the alleged search; 2) the claimant's interest in the subject matter; 3) the claimant's subjective expectation of privacy in the subject matter; and 4) whether the subjective expectation of privacy was objectively reasonable, having regard to the totality of circumstances. (See: *R v Tessling*, 2004 SCC 67 [2004] 3 SCR 432 para 32 [*Tessling*]; *R v Patrick*, 2009 SCC 17 para 27, [2009] 1 SCR 579 [*Patrick*]; *R v Cole*, 2012 SCC 53 para 40, [2012] 3 SCR 34 [*Cole*]; *R v Spencer*, 2014 SCC 43 para 18, [2014] 2 SCR 212 [*Spencer*])

[18] *Fontana and Keeshan* identified at 20-21:

> Once the "reasonable expectation of privacy" test is accepted as the keystone of the process, a variety of novel fact situations may be subject to scrutiny which initially may not seem to have fit the "search or seizure category", such as the practice of "participant electronic surveillance" that occurred in *R. v. Duarte* [1990] 1 SCR 30 [*Duarte*]] ....

[19] In *R v Duarte* [1990] 1 SCR 30 [*Duarte*], Justice La Forest said the following:

> ... the *Charter* is meant to guarantee the right to be secure against unreasonable search and seizure. A conversation with an informer does not amount to a search and seizure within the meaning of the *Charter*. Surreptitious electronic interception and recording of a private communication does. Such recording, moreover, should be viewed as a search and seizure in all circumstances save where all parties to the conversation have expressly consented to it being recorded. ...

[20] In *R v Finlay* (1985), 23 CCC (3d) 48 (Ont CA), the Ontario Court of Appeal arrived at the same conclusion respecting the interception of private communications.

[21] The courts have been called upon to wrestle with whether, when and how, the concept of reasonable expectation of privacy should be applied to new technologies and evolving investigatory methods and techniques. In *Spencer*, for example, a reasonable expectation of privacy was found in basic tenet subscriber information held by an intricate Internet service provider. In *R v TELUS Communications Co.*, 2013 SCC 16, [2013] 2 SCR 3 [*TELUS*], a majority of the Supreme Court of Canada concluded that text messages would attract a reasonable expectation of privacy and therefore constitute private

communication within the meaning of s. 183 of the *Criminal Code*, dealing with the interception of private communications.

[22] The reasonable expectation of privacy issue is also often tied with the issue of standing; the expectation of privacy is directed to protection of the security of the person and is personal to the accused.

[23] Although it is well established that s. 8 protects people and not places, the courts have been especially sensitive to an individual's expectation of privacy within the home/residence. The inherent right to an expectation of privacy with respect to one's dwelling was confirmed by the Supreme Court of Canada in *R v Silveira*, [1995] 2 SCR 297 [*Silveira*].

[24] Cory J., writing for the majority in *Silveira*, stated that the home is where the expectation of privacy is at its highest. In *R v Feeney*, [1997] 2 SCR 13 [*Feeney*], Justice Sopinka stated that "...the legal status of the privacy of the home was significantly increased in importance with the advent of the *Charter* ..." (para. 43). Justice Fish in *R v Morelli*, 2010 SCC 8, [2010] 1 SCR 253, writing for the majority, emphasized the importance with which courts must treat the privacy expectations of an individual in his or her home.

[25] The courts have also considered the issue of consensual searches. A search conducted with the consent of the individual to be searched or whose premises are to be searched will be valid provided the consent is voluntary and issued from a conscious operating mind that is free from disability and with the knowledge of the consequences. Consent must be expressed by word or explicit conduct and seldom can it be inferred. The validity of consent is a question to be examined on a case-by-case basis.

[26] The legal capacity of a third party to give valid consent to a search will usually depend upon the consenting party's occupational rights over the place to be searched. In *Cole*, in the context of computer searches, the Supreme Court of Canada expressly rejected the approach taken by some American cases in regards to third-party consent. The notion that third-party consent was justifiable because the individual voluntarily assumed the risk that his information would fall into the hands of law enforcement involved a kind of risk analysis that the Supreme Court has consistently rejected. The doctrine of third-party consent was also inconsistent with the court's jurisprudence on first-party consent enunciated in *R v Borden*, [1994] 3 SCR 145.

[27] The adoption of the doctrine of third-party consent in Canada would imply that the police could interfere with an individual's privacy interest on the basis of consent that is not voluntarily given by the right holder and is not necessarily based on sufficient information in his or her hands to make a meaningful choice. The Canadian courts have rejected such a doctrine consistently.

[28] In *R v Reeves*, 2018 SCC 56 [*Reeves*], the police discovered child pornography on a home computer that Reeves shared with his spouse. His spouse consented to the police entry into the home and the taking of the computer from a shared space. The officer did not have a warrant. The Supreme Court said that shared control did not mean no control. By choosing to share a computer with others, people do not relinquish their right to be protected from the unreasonable seizure of it. The court identified that at no point did Reeves voluntarily relinquish control of his personal computer and

any resulting lack of control over the computer could not be said to be voluntary. While it is reasonable to ask citizens to bear the risk that a co-user of their shared computer could access data on it and even perhaps discuss the data with police, it was not reasonable to ask them to bear the risk that the co-user would consent to the police taking the computer. In light of the deeply intimate nature of information that could be found in a personal computer, Reeves' subjective expectation of privacy was objectively reasonable. Reeves had a reasonable expectation of privacy in the shared computer and his rights had not been waived. Accordingly, the taking of the computer constituted a seizure within the meaning of s. 8. It was a warrantless seizure and it was not reasonable, because it was not authorized by any law. It violated Reeves' rights under s. 8. In that case, given the seriousness of the state conduct, and its impact on Reeves' *Charter*-protected interest, the Supreme Court upheld the application judge's conclusion that the admission of evidence would bring the administration of justice into disrepute and the evidence was excluded.

[29] It is with these principles respecting s. 8 in mind that I address the issues raised by the accused.

EVIDENCE ON THE *VOIR DIRE*

[30] Brigitte Vey testified that in October, 2012, she began to be concerned that her husband, Curtis Vey, was having an affair. She testified that in December, 2012, she placed a pink mini iPod recording device in her home, in the dining room buffet, where it would not have been visible to Curtis Vey. Brigitte Vey placed the pink mini iPod in a hidden place and turned the recording function on. She recorded Mr. Vey while he was alone in the home. Brigitte Vey testified she listed to the recording and heard the

activities of Curtis Vey, including him making a phone call. She testified that she confronted Mr. Vey with the recording and showed the pink mini iPod device to him. Thereafter, she began to check her husband's email and phone records regularly to see if he was having an affair.

[31] In June, 2013, Brigitte Vey and Curtis Vey went to Phoenix, Arizona to stay at the townhouse condo they had purchased there. Brigitte Vey returned home on a Friday. Curtis Vey returned home the next Wednesday or Thursday. Brigitte Vey testified that when she got back from Phoenix, she stopped at a store on the way home and purchased a new iPod, because she was still suspicious that her husband was having an affair. She testified she purchased a new black iPod that was the size of a phone, because Curtis Vey knew about the pink mini iPod and she believed he suspected that she was taping him with the pink mini iPod. She testified she purchased a new iPod so that Curtis Vey would not know he was being taped. She paid cash for the black iPod, so that the purchase would not go through their family accounts and alert Curtis Vey. She agreed that she knew Curtis Vey suspected the old iPod, because she had told him she taped him with it. She purchased a new iPod because he would not know of the new iPod.

[32] Brigitte Vey testified that she began to record Curtis Vey's activities when he was in the home and she was not at home. She would put the black iPod on a ledge within the dining room table and would turn it on to record prior to leaving for work. The iPod was not visible in that spot and she indicated that you could not see the iPod even if you looked under the table. She testified this was a different place from the place she had placed the pink

mini iPod she had previously used to record Mr. Vey. She testified Mr. Vey would not be able to see this iPod and would not know it was there.

[33] Brigitte Vey testified that she began recording Curtis Vey on June 20. She would record for 12 or 13 hours a day on the days she was out of the home. She would set the device to record, around 6:00 or 6:30 in the morning, and then retrieve it and turn it off when she came home from work, at around 7:00 or 7:30 in the evening. She testified she left the recording device on other days after June 20, such as June 26. She testified she put the black iPod in the same hidden place. Ms. Vey testified she did not say anything to Curtis Vey about the recording. When she listened to the recordings, she believed she heard Curtis Vey making phone calls. She also believed she heard him deleting the phone calls. She continued to be suspicious.

[34] Brigitte Vey put the black iPod in the dining room table to surreptitiously record Curtis Vey again on July 1, 2013. She put the iPod in the usual spot, underneath the dining room table, where it could not be seen.

[35] When Brigitte Vey got home on July 1, around 7:00 or 7:20 p.m., she retrieved the black iPod and stopped the recording function. She immediately started to listen to the recording, because Curtis Vey was outside. The next day, on July 2, she continued to listen to the recording during her breaks at work. Brigitte Vey heard something on the tape that caused her to believe her husband was having an affair. When she went home that night she confronted Curtis Vey that he was having an affair with Angela Nicholson. After the confrontation, she listened to further portions of the recording by herself. She heard Curtis Vey and Angela Nicholson speaking on the recording about their affair; that they had been in the family condo in Phoenix; and then

she heard a conversation where she believed Curtis Vey was talking about killing Angela Nicholson's spouse. Brigitte Vey then played the recording for her son and his girlfriend who were at the Vey home. After listening to some of the recording, her son decided they all needed to leave the home. Brigitte Vey told Curtis Vey that she had recorded him. She testified Curtis Vey saw her hand the black iPod recording device to their son. After they left, her son's girlfriend phoned a friend, whose husband was an R.C.M.P. officer. This was still on July 2. Brigitte Vey, her son and his girlfriend went to the home of the R.C.M.P. officer. They then left there and went to her daughter's home in Warman. This was in the early hours of July 3, 2013.

[36] Once they got to Brigitte Vey's daughter's home, they played the recording through a speaker and they all listened to it. At that point, her son phoned the R.C.M.P. in Warman. This was around 2:00 or 2:30 a.m. on July 3. After her son called the R.C.M.P., Brigitte Vey went into the R.C.M.P. with her daughter and her son. She brought the black iPod to the police. She did not recall who she spoke to at the R.C.M.P. initially. While at the police station, she testified she gave a statement to the police as to what she had found. She testified she handed the black iPod over to police. The officer did not play any portions of the recording while Brigitte Vey was present. She told the police the time frame (place) on the recording where she heard the discussion about killing someone was discussed. When asked by Crown counsel if she wanted to give the police the iPod, Brigitte Vey testified, "I wanted them to listen to see if what they heard was what we heard". She has not had the iPod in her possession since that date.

[37] Brigitte Vey testified that Curtis Vey knew she had recorded him on prior occasions, in December, 2012 and another time in January, 2013 because she had told him she recorded him. She had told him about the other pink mini iPod recorder. When asked by the Crown what permission, if any, did she give the police with respect to the recording, she testified, "that they could listen to it and that they could take it".

[38] Brigitte Vey confirmed that the conversation recorded on the iPod between Curtis Vey and Angela Nicholson took place in the Vey family home. This is a farmhouse, on a farm. It was the personal residence of Curtis Vey and Brigitte Vey. This was the only residence of Curtis Vey as at July 1, 2013 in Canada. Brigitte Vey and Curtis Vey lived at the home alone. Brigitte Vey testified that she still owned the pink mini iPod that she had used to record Curtis Vey in 2012 and early 2013. Brigitte Vey testified that when she left the pink mini iPod out to record Curtis Vey, she left it in a spot where Curtis Vey could see it. Brigitte Vey acknowledged she never told Curtis Vey she had purchased the second black iPod. She did not want him to know that she had purchased another iPod. She confirmed she hid the new black iPod under the table, with the intention that he would not know that he was being recorded. She did not tell Curtis Vey she was recording him. She recorded him to try to determine if he was having an affair. She testified it was her intention, at that point, to use the recording for her own private purposes. She testified it was not her intention, when she put the recording under the table, to bring it to the police and she had no thought of that at that time.

[39] When Brigitte Vey went to police in the early morning of July 3, she was met by a female officer. She told the female officer that, "I was only

going to use it for my own sake, because I thought if I caught him cheating I'm going to leave". Brigitte Vey confirmed on July 3 that the female officer (Cst. Russell) said to her, "Is this the iPod that everything is recorded on? Okay. So I'm going to have to take this from you. Going to be keeping this, until we get it, at a minimum, get a copy made". Ms. Vey confirmed that was what Cst. Russell said to her. Ms. Vey confirmed that Cst. Russell later said, "We'll try and get a recording from it, but for now I'm going to keep this until-until we can get what we need".

[40] Ms. Vey also confirmed that it was her son who called the police from her daughter's house at Warman, in the early morning of July 3, and what he conveyed to her was that the police officer said, "Come down and talk to us". Brigitte Vey confirmed that her son told the police on July 3 that she had put a recording device in the family house, when she was not present, and that it captured a recording between Curtis Vey and Angela Nicholson. She was told by the police to come to the police station on the early morning of July 3 and bring that recording with her.

[41] On July 3, 2013, around 2:30 a.m., Cst. Dereck Wierzbicki, who was an officer with the R.C.M.P. Major Crimes North, received a call from an R.C.M.P. constable (Cst. Russell) who was working out of the Martensville detachment. Major Crimes North provides special assistance to R.C.M.P. detachments to investigate major crimes. Major Crimes Unit officers take additional education and training in relation to interviewing, judicial authorizations, production orders, search warrants, one-party surveillance consents, etc. Constable Russell told Cst. Wierzbicki that she had received a complaint which was dispatched to her, that someone had a recording about

their husband trying to kill them. That was all the information that Cst. Russell provided to Cst. Wierzbicki when she called him at 2:30 a.m.

[42] Constable Wierzbicki testified that because Cst. Russell had such limited information, he asked her to go out and meet with the people, obtain a statement from the woman, and seize the recording device that the recording was made on. Constable Wierzbicki testified that at the time of the call, he was not sure he knew what the recording was made on; he just knew it was a recording. He confirmed he told Cst. Russell to seize the recording and obtain a statement from the witness. Cst. Wierzbicki testified that when he used the term seize, he meant that the constable was to take the recording into police custody and treat it as an exhibit. Constable Wierzbicki asked Cst. Russell to get him a recording data statement updater report and he would look at it in the morning, when he got to work.

[43] Constable Wierzbicki testified that when he went to work in the morning of July 3 (at regular business hours), he found that Cst. Russell had updated her reports. Based on what Cst. Russell wrote in the report, Cst. Wierzbicki believed that this was a file that the Major Crimes Unit should be involved with. He testified that Major Crimes should start "game planning".

[44] Constable Wierzbicki testified that he arranged for the recording device to be taken to Regina for "Tech Crimes" to download the recording. He also arranged for the transcribing unit of the R.C.M.P. Tech Crimes to work around the clock to get the recording transcribed. The recording was 13½ hours long.

[45] Constable Wierzbicki testified that the Major Crimes Unit came up with a plan to do a search warrant on Curtis Vey's home and Angela Nicholson's home. In conjunction with that, they planned to do an undercover operation with a one party consent, wherein undercover police officers would pose as a cell mate for Curtis Vey and Angela Nicholson. He also arranged for the interviewing team to interview Mr. Vey and Ms. Nicholson.

[46] He testified that he also arranged for police from local detachments in the Wakaw area and Melfort area to make arrests on July 6 simultaneously with the date they were going to execute the search warrants.

[47] Police arrested Angela Nicholson on July 6, at about 8:00 a.m., and Curtis Vey was arrested on July 6 at about 8:00 a.m. Constable Wierzbicki testified that the search warrants that had been obtained were executed on July 6 at the same time as the arrests. The homes of both accused were searched. The police were looking for computers, cell phones, and telephone records of each of the accused persons.

[48] Constable Wierzbicki testified that both accused persons were arrested, given their rights to counsel, and then transported to the Prince Albert detachment. Both were subsequently placed in individual cells, each with an undercover operator. Constable Wierzbicki testified that the Major Crimes Unit brought the "Tech Crime" guys to help with the download of information off of the computers located at the homes of Mr. Vey and Ms. Nicholson. Constable Wierzbicki had not had any direct contact with Brigitte Vey as of July 6, 2013, the date the accused were arrested.

[49] Constable Wierzbicki testified that in his opinion, he felt he did not need to obtain a search warrant in order to remove the recorded conversation from Brigitte Vey's iPod. He testified he did not think he needed to get a search warrant because "the device had been handed over by Brigitte Vey to the police officers on her own volition". She told him it was her iPod. He testified, in examination-in-chief, that in any event, there was "a little bit of exigency here to determine what we were dealing with and I did not think we needed a search warrant". Constable Wierzbicki said that the exigency was that there was a plan in place for two people to be murdered. He testified they did not know all of the details of the recording and "while everyone had listened to portions of it, we were unsure of all of the information on there and we needed to hear it". Constable Wierzbicki testified that on July 5, after the Tech Crime Unit took the recording off the iPod (downloaded and accessed it), they provided the iPod to him.

[50] On cross-examination, Cst. Wierzbicki was unable to recall precisely whether Cst. Russell had told him the recording was on an iPod or just a recording. He testified that at 2:30 a.m. on July 3, when Cst. Russell first called him, the information he had from her was limited and he requested her to get more for him. He confirmed he directed Cst. Russell to seize the iPod on July 3 at 2:30 a.m. Constable Wierzbicki testified he did not believe he knew how the recording had been made when he told Cst. Russell to seize it. He did not know who owned the iPod, although he believed it to be the complainant's. He did not think he knew where the recording had been made. When he told Cst. Russell to seize it, he also asked Cst. Russell to get more information. He confirmed he did not tell Cst. Russell to wait until she got that further information and conveyed it to him before seizing the iPod. He

testified that he asked Cst. Russell to get the information and seize the iPod. He was not asking Cst. Russell to get the information, before she seized the iPod.

[51] The information that Cst. Wierzbicki received when he arrived at the Major Crimes Unit in the morning was that Cst. Russell had seized the iPod.

[52] In cross-examination, Cst. Wierzbicki confirmed when he arrived at the Major Crimes Unit in the morning, he was advised by Cst. Russell that the iPod had been used to record in the Vey residence. He became aware the recording of Curtis Vey and Angela Nicolson's conversation was made, surreptitiously in the Vey home, and Curtis Vey and Angela Nicholson did not know they were being recorded.

[53] Constable Wierzbicki testified that when he received the information that Brigitte Vey had surreptitiously made a recording of Curtis Vey and Angela Nicholson's conversation in the Vey residence, he had discussions with other officers in the Major Crimes Unit. He testified the officers discussed it and they felt they did not need judicial authorization to seize the private conversation between these people. When asked who in his office was involved in these discussions, he testified that "in essence, our entire office. It's just kind of spitballing around the office." Constable Wierzbicki believed Cpl. Wayne Stevenson and Sgt. Larry Brost were part of those discussions. Constable Wierzbicki did not make any notes of that discussion. Constable Wierzbicki confirmed Major Crimes Unit had the information that the surreptitious recording was made of a private conversation between two people without their consent. Major Crimes Unit

decided they did not need judicial authorization to seize the recording. He testified he did not believe they needed judicial authorization, even though he and the other officers were aware the recording was made of a private conversation, unknown to the two parties in the conversation, in the confines of one of the parties' own home.

[54] On cross-examination the officer gave the following evidence about whether the iPod was seized from Brigitte Vey or whether she voluntarily gave it to police:

> Q Actually, the device was seized by you. You directed Constable Russell to seize the device, am I correct?
>
> A After Brigitte turned it over, yes.
>
> Q No, no, that's not - - that's not what you said and that's not what happened. You got a call from Constable Russell saying, I got a phone call from this lady ---
>
> A M-hm.
>
> Q –who says she's got a recording of her husband and another lady talking about killing their spouses. You directed Constable Russell to seize the iPod and to get a statement from her?
>
> A Yes.
>
> Q Correct? And --
>
> A I assumed she would be willing to assist us, since she contacted the police.
>
> Q Well, that wasn't what you told her. You told her to seize the iPod.
>
> A Yes.

Q Okay. And, actually when we looked at tape – tape recording conversation between Constable Russell and Ms. Vey, that's exactly what she did. She said, You've got to turn this over to me.

A. Yes.

Q That was what you had directed her to do; correct?

A Yes.

[55] Constable Wierzbicki confirmed, on cross-examination, that the police obtained a judicial authorization to go into Curtis Vey's home to search on July 6. But Cst. Wierzbicki just did not believe they needed one to seize or download the conversation from the iPod. He testified that in his mind, the distinction was that the iPod was turned over to police and the police did not go into the home to get it. He testified further, "We're talking about some exigency circumstances, to determine what we were exactly dealing with".

[56] Constable Wierzbicki confirmed that he transported the iPod to the Tech Unit in Regina in order to download the full statement. When he did this, they (Cst. Wierzbicki and the Major Crimes Unit) were aware that the conversation was about Mr. Vey killing his spouse and Ms. Nicholson killing her spouse, because Cst. Russell had said that in the report that she filed with Cst. Wierzbicki, on the morning of July 3.

[57] Constable Wierzbicki confirmed that he began the process of obtaining search warrants for the Vey/Nicholson residences and obtaining production orders for their phone records. Constable Wierzbicki confirmed that search warrants were being obtained over the period of July 3, 4, 5 and up to the time of the searches and arrest on the morning of July 6. The investigation and search warrants included seizure of computers, cell phones,

or iPhones. Constable Wierzbicki confirmed that the rationale for the seizure of cell phones and computers was as set out by him in a document prepared by him which was filed as Exhibit V1 on this *voir dire*. He wrote in Exhibit V1 that from his experience, he knew there would potentially be further conversations, texting or searches of the Internet for ways to kill on the accused's phones. Constable Wierzbicki wrote in Exhibit V1, "This is not the first time that he has come up with this plan and this - and this may further identify witnesses. The evidence would remove any defence that this is just a fantasy and would solidify the charge".

[58] Constable Wierzbicki confirmed that he was aware that just getting Brigitte Vey's permission to search the Vey residence was not enough. He knew he needed a judicial authorization.

[59] Constable Wierzbicki confirmed that the police placed an undercover operator in the cells of Angela Nicholson and Curtis Vey. Each of these operators provided their consent to having each of their conversations with Angela Nicholson and Curtis Vey recorded. Constable Wierzbicki agreed that the undercover officer who would go into the cell with Curtis Vey would have signed a form saying he was agreeing that his conversation with Curtis Vey can be recorded, and that a similar consent involving the undercover officer who was recording the conversation with Angela Nicholson would have been obtained. Constable Wierzbicki acknowledged that the recording of a conversation between two people by the state, without the consent of either party, is illegal. When asked if he thought anyone else could make that type of a recording, his answer was, "Technically no. But I believe there are circumstances where it's accepted." On further cross-examination, he agreed

that private individuals do not have the authority to record the conversation of two others, without their consent.

[60] Constable Wierzbicki acknowledged that he did not tell Cst. Russell to call him back immediately (as soon as she got further information) when he spoke to her at 2:30 a.m. on July 3. He instructed Cst. Russell to get back to him in the morning, when he would be at the office. Constable Wierzbicki knew from Cst. Russell's report that he had incomplete information, but he knew what was alleged to be on the recording. Constable Wierzbicki confirmed he did not make any attempt to obtain a judicial authorization based on the information he had, with respect to the recording, on the iPod.

[61] Constable Wierzbicki testified that no surveillance was put on Curtis Vey and Angela Nicholson in the period between July 3, when the police learned of the alleged offence, and July 6, which was the date of the arrest and execution of the search warrants. When asked if there was urgency to put the accused under immediate surveillance on July 3, Cst. Wierzbicki testified, "We talked about both Brigitte Vey and Jim Taylor. They were aware of the situation. Both felt they were safe for the time being". The police did not put surveillance on either accused until approximately one hour before their arrest on July 6.

[62] Constable Wierzbicki confirmed that the police seized computers and phones from the accused's residences, computers and phones which were seized were examined, and a search of the house and buildings took place, but nothing else was found which pointed towards a plan to murder anyone.

[63] Constable Wierzbicki, on cross-examination, again testified that the decision to not get a warrant to download the conversation from the iPod was made in consultation with his two other senior officers. There was no effort to obtain any authorization to intercept the iPod recorded conversation from the morning of July 3 onward. In cross-examination, the officer testified that this decision was based on a rationale that the iPod was voluntarily turned over to the police. The officer said, "I still believe she volunteered to turn it over. We seized it though". Constable Wierzbicki also testified that the police collectively felt that surveillance was not required on Curtis Vey or Angela Nicholson on July 3. He said such surveillance "was only required on July 6, shortly before the arrest."

[64] Crown and Defence agreed to the following facts on the *voir dire*:

1. At approximately 1:41 AM on July 3, 2013, Sean Vey called the Warman R.C.M.P and reported that his mother, Brigitte Vey, had recorded his father, Curtis Vey, because she suspected he was having an affair. The recording captured a conversation between Curtis Vey and a woman planning to kill his mother and this woman's husband.

2. As a result of this call, Cst. Joanne Russell contacted the R.C.M.P. Major Crimes Unit and spoke with Cst. Dereck Wierzbicki. She advised Cst. Wierzbicki that Brigitte Vey had an iPod with this recording, and he directed her to seize the iPod.

3. Brigitte Vey and Sean Vey attended the R.C.M.P. detachment at 2:40 a.m. Brigitte brought the iPod with her.

4. Constable Russell took a statement from Ms. Vey starting at 2:54 a.m. Constable Russell seized the iPod at 2:55 a.m. Ms. Vey described the content of the recording to the officer. Following the statement, Cst. Russell listened to the recording on the iPod and took notes about the recording.

5. Constable Russell co-ordinated with Cst. Wierzbicki to have the recording downloaded from the iPod by the Saskatchewan Technological Crimes Unit.

6. The R.C.M.P. did not have a warrant to seize or search the iPod.

[65] A CD of the recording on the iPod, a transcript of the audio recording on the iPod and the will of Brigitte Vey were also filed as exhibits on the *voir dire*.

ANALYSIS

[66] Section 8 of the *Charter* provides that everyone has the right to be secure against unreasonable search or seizure. Curtis Vey and Angela Nicholson each argue that their s. 8 *Charter* rights have been breached and that the information obtained from the iPod ought to be excluded from the evidence against each of them at the trial of this matter.

A. When Does Section 8 Protection Apply?

[67] Section 8 of the *Charter* provides that everyone has the right to be secure against unreasonable search or seizure. Section 8 of the *Charter* applies "where a person has a reasonable privacy interest in the object or subject matter of the state action and the information to which it gives access (*Cole* at par. 34; *Spencer* at para 16).

[68] Curtis Vey and Angela Nicholson each assert that their s. 8 *Charter* rights were violated. I must examine individually whether Curtis Vey and/or Angela Nicholson's s. 8 Charter rights were violated.

[69] A person claiming that their s. 8 *Charter* rights have been infringed must first establish that they have standing, that is, that they have a reasonable expectation of privacy in the subject matter of the search. That is, that the person subjectively expected that the subject matter of the search would be private and also that his/her subjective expectation was objectively reasonable (*Edwards* at para 45). Whether the person had a reasonable expectation of privacy must be assessed in the totality of the circumstances *(Edwards* at paras 31 and 45; *Spencer* at paras 16-18, *Cole* at para 39; *Patrick* at para 26). It is only if the applicant's subjective expectation of privacy was objectively reasonable in the circumstances, that the applicant will have standing to assert his/her s. 8 right. If the court concludes the applicant has standing, the applicant may argue that the state action in question was unreasonable. If, however, the court determines that the applicant does not have a reasonable expectation of privacy in the subject matter of the alleged search, then the state action cannot have violated the applicant's s. 8 right. He/she will not have standing to challenge its constitutionality.

[70] The reasonable expectation of privacy inquiry is fact-sensitive and fact-specific. However, the court, in determining whether the claimant has demonstrated a reasonable expectation of privacy, is not engaged in a factual inquiry in the usual sense. The court must, in examining the relevant facts, make a determination that is not purely fact-driven, but is also reflective of fundamental societal values. A finding that a claimant has a reasonable expectation of privacy is not only a description of a specific constellation of factual considerations, but is also a declaration of societal aspirations and values (*R v Orlandis-Habsburgo*, 2017 ONCA 649 at para 41, 352 CCC (3d) 525 [*Orlandis-Habsburgo*]). The Ontario Court of Appeal in *Orlandis-Habsburgo* further identified the intersection of factual considerations and societal values in the context of the reasonable expectation of privacy analysis:

> **42** The value Canadian society places on the individual's right to be left alone by the state, absent state justification for any intrusion, lies at the heart of the normative inquiry required by s. 8. Personal privacy is crucial, both to individual freedom and security and to the maintenance of a dynamic and healthy democracy. If a court holds that an individual has a reasonable expectation of privacy in a certain place, thing or information, the court is declaring that community values will not accept that the state should be allowed to intrude upon individual privacy in the way that it did without first establishing compliance with the reasonableness standard in s. 8 of the *Charter*: see *Ward*, at paras. 79-87 [*R v Ward*, 2012 ONCA 660, 112 OR (3d) 321]; *R. v. Pelucco*, 2015 BCCA 370, 327 C.C.C. (3d) 151, at para. 63; and *R. v. Wong*, [1990] 3 S.C.R. 36, at pp. 45-46. Professor Stewart captures the inquiry well:
>
> > Put another way, the ultimate normative question is whether, in light of the impact of an investigative technique on privacy interests, it is right that the state should be able to use that technique without any legal authorization or

> judicial supervision. Does our conception of the proper relationship between the investigative branches of the state and the individual permit this technique without specific legal authorization?

43 The normative nature of the reasonable expectation of privacy inquiry explains three significant features of that inquiry. First, the s. 8 claimant's belief or appreciation of the risk that the state could intrude upon the claimant's privacy in the way that it did is not determinative of the inquiry. Not every risk of state intrusion is acceptable to the community. The question is not whether there was a risk that the state would invade an individual's privacy, but whether the community regards that risk as acceptable: *Patrick*, at para. 14; *Tessling*, at para. 42; and *Gomboc*, at para. 34 [*R v Gomboc*, 2010 SCC 55, [2010] 3 SCR 211].

44 A subjective expectation of privacy is an important factor to be taken into account when deciding whether in the totality of the circumstances the claimant had a reasonable expectation of privacy. A subjective expectation of privacy cannot, however, be a prerequisite to a finding of a reasonable expectation of privacy. Otherwise, the protection afforded to personal privacy by s. 8 would shrink in direct correlation to the pervasiveness and notoriety of state intrusions upon personal privacy: *Tessling*, at para. 42.

45 Second, the reasonable expectation of privacy inquiry must be framed in neutral terms. The community places no value on the ability of drug producers and traffickers to use their homes to hide their activities from the police. To frame the inquiry by reference to the criminal activity in issue would all but eliminate the right to privacy through the adoption of a system of subsequent validation for searches: *Wong*, at pp. 49-50. Instead, the inquiry must be framed in neutral terms, which look to an individual's interest in keeping private whatever he or she is doing within the confines of their residence: see *Spencer*, at para. 36.

46 Third, the value-laden nature of the expectation of privacy inquiry explains why the purpose of the state intrusion is important in assessing whether that intrusion violates a reasonable expectation of privacy. The community may accept certain state intrusions for certain purposes. For example, unfettered state access to business-related documents in a regulatory context may be seen as entirely consistent with

> community notions of personal privacy. However, the same state access to the same documents, but for a criminal law purpose may be regarded as an unacceptable state intrusion into personal privacy: see *Patrick*, at para. 38; *R. v. Colarusso*, [1994] 1 S.C.R. 20, at p. 55; and *Ward*, at para. 77.
>
> **47** I make one last point about the normative nature of the reasonable expectation of privacy inquiry. The societal values furthered by personal privacy are central to the inquiry. However, other values may also have an impact on that inquiry. I am not referring here to state interests such as law enforcement. Those interests are taken into account in the reasonableness assessment which follows a determination that a reasonable expectation of privacy exists. Rather, I refer to societal values reflected in the legitimate interests of third parties. These interests will in some circumstances diminish or otherwise modify a claimant's reasonable expectation of privacy. For example, a young person clearly has a reasonable expectation of privacy insofar as a search of his person is concerned. The nature and scope of that expectation must, however, be modified if the search is conducted on school property by school authorities. The reasonable expectation of privacy analysis must take into account societal values reflected in the countervailing interests that other students and teachers have in maintaining a nurturing, safe and orderly environment in the school: see *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, at paras. 31-34; *Gomboc*, per McLachlin C.J. and Fish J., dissent (but not on this point), at para. 109; and *Ward*, at para. 98. [footnotes omitted]

[71] In *Spencer*, Cromwell, J. at para. 18, organized the factors relevant to the reasonable expectation of privacy inquiry into four groups:

> **18** The wide variety and number of factors that may be considered in assessing the reasonable expectation of privacy can be grouped under four main headings for analytical convenience: (1) the subject matter of the alleged search; (2) the claimant's interest in the subject matter; (3) the claimant's subjective expectation of privacy in the subject matter; and (4) whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances ...

(See also *Cole* at para 40; *Patrick* at para 27; *Tessling* at para 32).

[72] The Supreme Court of Canada, in *R v Marakah*, 2017 SCC 59 at para 11, [2017] 2 SCR 608 [*Marakah*] confirmed the inquiry articulated in *Spencer* and *Cole*, which must guide the reasonable expectation of privacy analysis:

> **11** In considering the totality of the circumstances four "lines of inquiry" (*Cole*, at para. 40) guide the court's analysis:
>
> 1. What was the subject matter of the alleged search?
>
> 2. Did the claimant have a direct interest in the subject matter?
>
> 3. Did the claimant have a subjective expectation of privacy in eh subject matter?
>
> 4. If so, was the claimant's subjective expectation of privacy objectively reasonable?
>
> ...

[73] As stated above, it is only if the answer to the fourth question is yes – that the claimant's subjective expectation of privacy was objectively reasonable – that the claimant will have standing to assert his/her s. 8 right. So the first question that must be addressed is whether either Curtis Vey and/or Angela Nicholson have standing: do either have a reasonable expectation of privacy in the subject matter of the state action.

B. Does Curtis Vey and/or Angela Nicholson have standing to challenge the search? That is, did Curtis Vey and/or Angela Nicholson Have a Reasonable Expectation of Privacy in the Subject Matter of the State Action?

[74] The four lines of inquiry set out in the jurisprudence above must be examined to determine if Angela Nicholson and/or Curtis Vey have

standing to challenge the search. To do so, they must establish that they had a reasonable expectation of privacy in the subject matter of the search.

(1) What Was the Subject Matter of the Search?

[75] The first step is to determine the subject matter of the search. How the subject matter of the search is defined may affect whether a claimant has a reasonable expectation of privacy. Care must be taken in defining the subject matter of the search. The Supreme Court, in *Marakah*, stated that the subject matter of the search must be defined functionally, not in terms of physical acts, physical space or modalities of transmission. It has been identified in the jurisprudence that how the subject matter is defined may affect whether the claimant has a reasonable expectation of privacy.

[76] Here, the subject matter of the search was not the black iPod itself. Correctly characterized, the subject matter of the search was Curtis Vey and Angela Nicholson's conversation, recorded and stored on the iPod. What the police were really after was the actual conversation between these two people. Clearly the police were not after the physical device (to collect fingerprints on it, for example). Rather, the police sought to preserve and permit access to the recorded conversation the iPod contained. To focus on the property rights at issue, that is, on the parties' interests in the iPod, neglects the important privacy rights in the conversation that are engaged. In *Marakah* at para 15, and *Reeves* at para 29, the Supreme Court identified that the subject matter must not be defined narrowly in terms of the physical space invaded, but rather by reference to the nature of the privacy interests potentially compromised by the state action.

[77] In *Wong* at 44, the court said s. 8 must keep pace with technological development. Abella J., in *TELUS* at para 5, stated "[t]echnical differences inherent in new technology should not determine the scope of protection afforded to private communications." In *Marakah*, a case involving the search of text messages, the court concluded that the subject matter of the search was the electronic conversation between the sender and the recipient.

[78] The subject matter of the search here is the conversation. It is not the iPod, or even the digital audio recording, but the conversation itself and the contents of the electronically recorded conversation. It is the private conversation which took place between Curtis Vey and Angela Nicholson on July 1, 2013 in the home of Curtis Vey that is the subject matter. The Crown acknowledges that the subject matter of the search is the conversation. The Crown brief at para. 23 states: "As in *Marakah,* the privacy interest did not exist in the medium that captured the conversation, but in the conversation itself."

[79] I conclude that for the purpose of determination of s. 8 here, for both Curtis Vey and Angela Nicholson, the subject matter is the conversation between Curtis Vey and Angela Nicholson, captured on the iPod. This includes the existence of the conversation, the identities of the participants, the information shared, and any inferences about associations or activities that can be drawn from that information (See *Marakah* at para 20*; Spencer* at paras 26-31).

(2) Did Curtis Vey and/or Angela Nicholson Have a Direct Interest in the Subject Matter?

[80] Curtis Vey had a direct interest in the information contained in the conversation recorded on the iPod that was the subject matter. He was a participant in the conversation and one of the authors of the conversation (see *Spencer* at para 50, *Patrick* at para 31 and *Marakah* at para 21). The conversation was a private conversation between Curtis Vey and Angela Nicholson. It was surreptitiously recorded by Brigitte Vey, who was not a participant.

[81] Angela Nicholson had a direct interest in the information contained in the conversation recorded on the iPod that was the subject matter. She was a participant in the conversation and one of the authors of the conversation (see *Spencer* at para 50, *Patrick* at para 31 and *Marakah* at para 21). The conversation was a private conversation between Angela Nicholson and Curtis Vey. It was surreptitiously recorded by Brigitte Vey who was not a participant.

[82] Curtis Vey and Angela Nicholson were the only participants in the conversation. They each had a direct interest in that conversation.

(3) Did Curtis Vey and/or Angela Nicholson Have a Subjective Expectation of Privacy in the Subject Matter?

[83] A claimant must have had a subjective expectation of privacy in the subject matter of the alleged search for s. 8 to be engaged. Justice Binnie in *Patrick*, at para 37, identified that the requirement that a claimant establish a subjective expectation of privacy is not a high hurdle. (See also *R v Jones*

2017 SCC 60 at para 20, [2017] 2 SCR 696). In *Marakah*, the court indicted that whether Mr. Marakah had a subjective expectation of privacy in the contents of his electronic conversation with another person was never in serious dispute.

[84] Here, the Crown argued that there was no evidence before the court on the *voir dire* upon which it could be determined that Curtis Vey and/or Angela Nicholson had a subjective expectation of privacy in the subject matter. The evidence before the court from Brigitte Vey is that she and Curtis Vey were the two people residing at their home. The home was located on a farm. On the date in question, Brigitte Vey went to work. Before leaving, she intentionally and surreptitiously hid a new black iPod within the dining table, in order to record her husband, including any conversation he may have with other people, and especially any potential conversations with any potential paramour. She hid the iPod such that Curtis Vey would not have been able to discover it. She had done this previously, with another pink mini iPod, and recorded Curtis Vey alone in their home on those occasions.

[85] The recording of the July 1 conversation identifies that only Curtis Vey and Angela Nicholson were present during the conversation which, as stated, took place within the confines of Curtis Vey's home. Curtis Vey and Angela Nicholson were having a private conversation in Curtis Vey's home on July 1, which is recorded on the iPod. Brigitte Vey testified that she and Curtis Vey's home was located on a farm. On the date in question Brigitte Vey went to work, leaving Curtis Vey at home.

[86] In a broader sense, it is well established that activities that are conducted within one's home, which has been described as a bastion of

personal privacy throughout the history of the common law, fall to the very centre of the zone of personal privacy (*Orlandis-Habsburgo* at para 76 and *Tessling* at para 22). It matters not that the information from the conversation may reveal only certain activities, or that the activities revealed are criminal (*Orlandis-Habsburgo* at para 76 and *Spencer* at para 36).

[87] Here, the subject matter of the alleged search is a private conversation between two people, which took place within the confines of one of the participant's home. This was a private conversation between Curtis Vey and Angela Nicholson, who were engaged in an extra-marital affair. The conversation took place at Curtis Vey's home, when he knew the only other occupant of the home, Brigitte Vey, was away at work. It is not unreasonable to infer that Angela Nicholson attended to the home of Curtis Vey, the man she was having an affair with (an affair he had denied to his wife), with the expectation that she and Curtis Vey would meet and talk in private. Curtis Vey had denied the existence of the affair to Brigitte Vey on previous occasions and according to the evidence of Brigitte Vey, he had gone to some lengths to deny and/or hide the affair. Curtis Vey and Angela Nicholson discuss very personal matters in their conversation. They discuss their families, their affair, and killing their spouses in the conversation. The Crown acknowledged that. "The content and demeanour of their conversation suggests that they expected it to be private: they discuss their affair, their families, and lower their voices when they are discussing how they will kill their spouses" (Crown brief para. 27).

[88] The private conversation must be described as confidential and highly personal. The information reveals biographical core information about

Curtis Vey and about Angela Nicholson. The Crown acknowledges that the accused persons spoke about their affair, their families, their work and the alleged conspiracy. In the context of the conversation, the accused persons had exclusive control over the information. The extent to which it could be shared was extremely limited, if not unable to be shared, but for the fact that it was illegally recorded by Curtis Vey's wife.

[89] It is clear on the evidence that each of Curtis Vey and Angela Nicholson had a subjective expectation of privacy in the subject matter - the conversation.

(4) Was Curtis Vey's and/or Angela Nicholson's' subjective expectation of privacy objectively reasonable?

[90] As indicated, it is only if a claimant's subjective expectation of privacy is objectively reasonable that the claimant has standing.

[91] The Supreme Court in *Edwards* and in *Marakah*, have identified that a number of factors may assist in determining whether it was objectively reasonable to expect privacy in different circumstances. In *Marakah*, the Supreme Court identified the factors which are relevant include: (a) the place where the search occurred; (b) the private nature of the subject matter, *i.e.*, whether the informational content of the electronically recorded conversation revealed details of the claimant's lifestyle or information of a biographic nature; and (c) control over the subject matter.

a) the place of the search

[92] The Supreme Court in *Marakah* indicated that the place may be helpful in determining whether a person has a reasonable expectation of

privacy. The place of the search is but one of several factors that must be weighed to determine whether the accused had a reasonable expectation of privacy for the purposes of s. 8. The court said in *Marakah*, beginning at para. 25:

> **25** Place may be helpful in determining whether a person has a reasonable expectation of privacy for [page628] the purposes of s. 8. At common law, privacy was often designated by place, as evident in the old dictum that every man's home is his castle: see *Tessling*, at para. 22.
>
> **26** Place may inform whether it is reasonable to expect a verbal conversation to remain private; depending on the circumstances, a conversation in a crowded restaurant may not attract the protection of s. 8, while the same conversation behind closed doors may.
>
> **27** The factor of "place" was largely developed in the context of territorial privacy interests, and digital subject matter, such as an electronic conversation, does not fit easily within the strictures set out by the jurisprudence. What is the place of an electronic text message conversation? And what light does that shed on a claimant's reasonable expectation of privacy? Place is important only insofar as it informs the objective reasonableness of a subjective expectation of privacy.

[93] In *Marakah*, the majority grappled with how to characterize the physical space of a text message for the purpose of this analysis. The court said that perhaps an electronic conversation does not occupy a particular physical space. If it does, it may be on the sender's phone or the recipient's phone or in the service provider's database or the device through which the messages are accessed or stored. In *Marakah*, the accused sent a text message to Mr. Winchester. The police obtained warrants to search Mr. Winchester's home and in the course they seized Mr. Winchester's iPhone. Ultimately, the court did not resolve where the place of the search was in *Marakah*, but said whether one views the place of an electronic conversation as a metaphorical

chat room or a real physical place, the place of the message conversation does not exclude an expectation of privacy. The court noted that s. 8 protects people, not places, and the question always comes back to what the individual in all of the circumstances, should reasonably have expected.

[94] The place of the search here was the data contained on Brigitte Vey's iPod. It was not the iPod. It was the recording of the private conversation. In *Reeves*, the court indicated that privacy includes control over and access to and use of information. Here, the place was the iPod recording of a private conversation between Curtis Vey and Angela Nicholson which took place in Curtis Vey's home; a private conversation which had been illegally surreptitiously recorded on the iPod.

b) the private nature of the information

[95] The private nature of the information must be considered with reference to the purpose of s. 8, which is to "to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state": *R v Plant*, [1993] 3 SCR 281 at 293. In considering the private nature of the information, the Supreme Court in *Marakah* stated:

> **32** In considering this factor, the focus is not on the actual contents of the messages the police have seized, but rather on the potential of a given electronic conversation to reveal personal or biographical information. For the purposes of s. 8 of the *Charter*, the conversation is an "opaque and sealed 'bag of information;": *Patrick*, at para. 32; see also *Wong*, at p. 50. What matters is whether, in the circumstances, a search of an electronic conversation may betray "information which tends to reveal intimate details of the lifestyle and personal choices of the individual" (*Plant*, at p. 293), such that the conversation's participants have a reasonable expectation of

> privacy in its contents, whatever they may be: see *Cole*, at para. 47; *Tessling*, at paras. 25 and 27.

[96] Here, the personal nature of the information that can be derived from the conversation is directly linked to the private nature of a private conversation between two people within the confines of one of the person's home. People are inclined to discuss personal matters in a private conversation, precisely because they understand that the conversation is private. The receipt of information is confined to the two people who are party to the conversation. If someone else intervened, the conversation could be stopped. Apart from possible interception – legal or illegal as is the case here – which cannot be considered for the purpose of determining a reasonable expectation of privacy (See *Patrick* at para 14; *Wong* at 47; *Duarte* at 43-44) – no one else knows about the conversation or its contents.

[97] Here the conversation was between Angela Nicholson and Curtis Vey. They spoke about their children, farming and their spouses. They discussed their affair and their lives without their respective spouses and mentioned a way their spouses could be killed. The conversation revealed the most intimate details of each of their lives, including the fact that they were having an extra-marital affair and how they could continue that affair. The conversation contained highly secretive personal information.

[98] It is difficult to think of a type of conversation or communication that is capable of promising more privacy than a private conversation between two people alone, occurring within the confines of one of the participant's personal residence, while no other person was present in the home. The private nature of the conversation (the subject matter) was extremely high.

c) control over the subject matter

[99] As indicated in *Marakah*, control, ownership, possession and historical use have been considered relevant to determining whether a subjective expectation of privacy is objectively reasonable. It is important to remember that the Supreme Court in *Reeves* (at para 37) quoting *Marakah* at para 38, confirmed that control is not an absolute indicator of a reasonable expectation of privacy, nor is lack of control fatal to a privacy interest. The court has recognized a reasonable expectation of privacy in places and things that are not exclusively under a claimant's control, including a bus depot locker where an accused had stored belongings even though a company owned the lockers and could access them at any time *(R v Buhay*, 2003 SCC 30 at paras 22-23, [2003] 1 SCR 631).

[100] It also must be remembered that control must be analyzed in relation to the subject matter - the conversation. As stated in *Marakah*:

> **39** Control must be analyzed in relation to the subject matter of the search: the electronic conversation. Individuals exercise meaningful control over the information they send by text message by making choices about how, when, and to whom they disclose the information. They "determine for themselves when, how, and to what extent information about them is communicated to others"...

[101] The Crown argues that Angela Nicholson had no control over the residence where the conversation took place. The Crown suggests this means a lack of control in respect of this factor. The Crown acknowledges that Angela Nicholson spoke in hushed tones to Curtis Vey, but argues she could not control who entered or exited the house. The Crown argues there is no evidence of what knowledge, if any, Angela Nicholson had about who else

may be at the house. The Crown argues that Curtis Vey shared the residence with Brigitte Vey, so he had diminished control. Brigitte Vey testified that she and Curtis Vey lived there. Brigitte Vey was at work on the day of the conversation. She surreptitiously recorded the conversation, because she would not be present when any potential conversation occurred. The Crown argues there is no evidence who, if anyone, else was present at the house during the time of the recording. The Crown argues further that there is no evidence of any attempts to control ingress to the house nor whether Curtis Vey or Angela Nicholson could observe the doors to ensure they remained alone.

[102] Here, Angela Nicholson and Curtis Vey were having a private conversation within the confines of Curtis Vey's home, where Curtis Vey lived with his wife Brigitte Vey. Brigitte Vey was working a 12 hour shift. There is no evidence that anyone other than Curtis Vey and Angela Nicholson were in the Vey home on that day. The recording discloses no persons other than Angela Nicholson and Curtis Vey were involved in the conversation. However, again it must be remembered the control that relates to the subject matter – the conversation. Curtis Vey and Angela Nicholson exercised meaningful control over the conversation, including the information they shared with each other. They made choices about how and when they disclosed information to each other. They could stop talking at any moment and/or start and stop at intervals. They controlled what they revealed. The fact that the private conversation took place in Curtis Vey's home, and that throughout they were the only two participants, only heightens each of their control over the conversation. Certainly for Curtis Vey, the conversation was within his home. Courts have consistently confirmed that the expectation of

privacy is at its highest in a person's home (*Silveira, Feeney, Morelli*). The Crown is not asserting someone else was present at the home or that anyone even came to the home during the conversation. The Crown's suggestion that there is no evidence that no other person was not present amounts to speculation and does not identify a lack of control over the private conversation.

[103] Angela Nicholson and Curtis Vey shared information with each other during the private conversation and so, in that respect, each did not have exclusive control of the conversation. There was a risk that Angela Nicholson could have disclosed the conversation to others if she chose (or likewise that Curtis Vey could have disclosed it). However, the risk that one of the participants could have disclosed the conversation to third parties does not change the analysis. To accept the risk that a co-conversationalist could have disclosed the conversation, is not to accept the risk of a different order, the risk that the state will intrude upon the conversation absent. *Marakah* stated clearly at para. 41:

> **41** The cases are clear: a person does not lose control of information for the purposes of s. 8 simply because another person possesses it or can access it. Even where "technological reality" (*Cole*, at para. 54) deprives an individual of exclusive control over his or her personal information, he or she may yet reasonably expect that information to remain safe from state scrutiny. Mr. Marakah shared information with Mr. Winchester; in doing so, he accepted the risk that Mr. Winchester might disclose this information to third parties. However, by accepting this risk, Mr. Marakah did not give up control over the information or his right to protection under s. 8.
>
> **42** The shared control aspect of this case is similar to that in *Cole*. Mr. Cole had pornography stored on his work computer. His employer, like Mr. Winchester in this case, could access

> the contents of the computer. Mr. Cole did not have exclusive control of the physical location searched (his work-issued laptop). Yet this Court held that Mr. Cole had a reasonable expectation of privacy in the subject matter of the search, i.e., the pornographic material stored on the computer: *Cole*, at paras. 51-58.

[104] The courts have said that the voluntary sharing of information, such as transmitting a text message, does not dissolve an individual's reasonable expectation of privacy. It is clear that a private conversation within the confines of a person's home, with no one else present, does not dissolve an expectation of privacy.

[105] The Crown argues further that this situation is distinguishable from *Reeves* or *Cole,* because neither Curtis Vey nor Angela Nicholson had control over or a privacy interest in the device recording the conversation. While Curtis Vey and Angela Nicholson did not have control over the iPod, it is not the iPod that is the subject matter. It is the conversation recorded on the iPod. The conversation, which is the subject matter, was illegally and surreptitiously recorded by Brigitte Vey on her iPod. *Reeves*, at para 38, guides us on this issue:

> **38** In any event, lack of control is not fatal to finding a reasonable expectation of privacy (*Marakah*, at para. 38). As Moldaver J. stated in *Marakah*, **"[w]here a loss of control over the subject matter is involuntary,** such as where a person is in police custody **or the subject matter is stolen from the person by a third party,** then **a reasonable expectation of privacy may persist"** (para. 130). ... At no point did Reeves voluntarily relinquish control of his personal computer. Any resulting lack of control over the computer therefore cannot be said to be voluntary. [Emphasis added]

[106] Here, Brigitte Vey had no shared interest in the conversation. She was not party to the conversation. Brigitte Vey had no subjective expectation

of privacy in the conversation. Brigitte Vey illegally recorded the conversation. At no point did Curtis Vey or Angela Nicholson voluntarily relinquish control over the conversation. They expected the conversation to remain private. They only transmitted it to each other. The action of Brigitte Vey in illegally recording the conversation does not negate the reasonableness of Curtis Vey's expectation or privacy nor does it negate the reasonableness of Angela Nicholson's expectation of privacy (*Marakah* at para 41). The reasonable expectation of privacy persists for both, as does control, despite the surreptitious recording.

[107] I conclude that the risk that Angela Nicholson could have disclosed the conversation or that Brigitte Vey illegally recorded the conversation does not negate Curtis Vey's control over the conversation or the information contained in the conversation. By choosing to have a private conversation, within the confines of his own home, in the absence of any other person besides Angela Nicholson, Curtis Vey was exercising control over the conversation. Curtis Vey did not voluntarily relinquish control. The risk that Angela Nicholson could have disclosed it if she chose to, or that Brigitte surreptitiously recorded it, does not negate the reasonableness of Curtis Vey's expectation of privacy against state intrusion.

[108] I conclude that the risk that Curtis Vey could have disclosed the conversation or that Brigitte Vey illegally recorded the conversation does not negate Angela Nicholson's control over the conversation or information contained in the conversation. By choosing to have a private conversation within the confines of Curtis Vey's home, in the absence of any other person besides Curtis Vey, Angela Nicholson was exercising control over the

conversation. Angela Nicholson did not voluntarily relinquish control. The risk that Curtis Vey could have disclosed it if he chose to or that Brigitte Vey surreptitiously recorded it, does not negate the reasonableness of Angela Nicholson's expectation of privacy against state intrusion.

d) Conclusion on Reasonable Expectation of Privacy and Whether Curtis Vey and/or Angela Nicholson Have Standing to Challenge the Search

[109] In *Marakah*, the court held that where two parties have a conversation that they expect to be private (in *Marakah*, the conversation was a text message conversation) each has standing to challenge an unlawful search as each had a reasonable expectation of privacy in the conversation. Here, the conversation was a face-to-face conversation.

[110] I conclude that Curtis Vey's subjective expectation that his private conversation with Angela Nicholson which took place in his own home, would remain private was objectively reasonable in the totality of the circumstances. Each of the three factors relevant to this inquiry - place, capacity to reveal personal information and control, support this conclusion.

[111] I conclude that Curtis Vey had a reasonable expectation of privacy in the conversation. Curtis Vey has standing to challenge the search and the admission of the evidence, even though the state accessed his conversation through Brigitte Vey's iPod.

[112] I also conclude that Angela Nicholson's subjective expectation that her private conversation with Curtis Vey, in Curtis Vey's home, would remain private, was objectively reasonable in the totality of the circumstances.

Each of the three factors relevant to this inquiry - place, capacity to reveal personal information and control, support this conclusion.

[113] I conclude that Angela Nicholson had a reasonable expectation of privacy in the conversation. Angela Nicholson has standing to challenge the search and the admission of the evidence, even though the state accessed her conversation through Brigitte Vey's iPod.

[114] Curtis Vey and Angela Nicholson both have standing.

C. Was There a Search or Seizure and, if so, Was the Search or Seizure Unreasonable?

[115] The key issue here is whether the police violated Curtis Vey's and/or Angela Nicholson's rights when they accessed, downloaded and transcribed the conversation recorded on Brigitte Vey's iPod. The protection afforded by s. 8 of the *Charter* only applies to the intrusive conduct by law enforcement authorities that can be said to amount to a search or seizure. The answer to such a question depends on whether an individual's reasonable expectation of privacy has been engaged and infringed (*Fontana and Keeshan*). If an individual's reasonable expectation of privacy has been infringed, then a s. 8 search or seizure has occurred. The claimant bears the burden of demonstrating the reasonable expectation of privacy on a balance of probabilities

[116] The Crown asserts that police did not violate Curtis Vey's or Angela Nicholson's rights because they did not "unreasonably intrude onto [either of] their reasonable expectation of privacy in the recorded conversation" (Crown brief para. 37). The Crown argues that the police were

not involved in creating the recording. The police role, the Crown asserts, was limited to receiving the device into their custody, listening to the recording that Brigitte Vey had told them about, and electronically downloading and copying that recording. The Crown's position is that the device belonged to Brigitte Vey and she brought it to police and voluntarily handed it to Cst. Russell. The Crown argues that Cst. Russell took the alleged threat seriously and she listened to the recording and provided her notes to Cst. Wierzbicki. The Crown asserts that police then took time to review the recording, including downloading the recording and making copies for investigative purposes, including creating a transcript. The Crown argues that the police action, in accepting the evidence Brigitte Vey brought to them, was not unreasonable. In essence, the Crown argues there was no search or seizure. The Crown asserts that the police actions did not intrude into Curtis Vey's or Angela Nicholson's reasonable expectation of privacy or to the extent that they did, that intrusion was wholly reasonable and thus, there is no violation of the accused's s. 8 rights.

[117] The law is well established that there is a presumption that the taking of an item by the police without a warrant violates s. 8 of the *Charter* unless the claimant has no reasonable expectation of privacy in the item or has waived his *Charter* rights.

[118] Here, the search or seizure complained of is the accessing and downloading of the private conversation between Curtis Vey and Angela Nicholson recorded on the iPod. The Crown acknowledges the subject matter is the conversation. The court, in *Marakah*, stated the subject matter must not be defined "narrowly in terms of the physical acts involved or the physical

space invaded, but rather by reference to the nature of the privacy interests potentially compromised by the state action" (at para. 15 citing *R v Ward,* 2012 ONCA 660, 112 OR (3d) 321 at para 65). In *Reeves* at para 18, the court acknowledged:

> **18** ... The *Charter* permits police to access shared places without a warrant when they act on the consent of a party who has a privacy interest in the place that is equal to and overlapping with the privacy interests of the other resident. A consent search or seizure is not a "search or seizure" within the meaning of the *Charter*. It is not unreasonable for one cohabitant to expect that his or her right to exclude others will trump another cohabitant's right to admit others. While one cohabitant cannot waive another cohabitant's *Charter* rights by providing consent, it is reasonable to recognize that a cohabitant can permit police access in her own right.

[119] In argument, the Crown argued that the taking of the physical iPod was not a seizure because Brigitte Vey voluntarily gave it to police. The evidence from Brigitte Vey was that she purposely, surreptitiously, recorded Curtis Vey by placing the black iPod in the dining room table of their home. She did this in an attempt to determine if Curtis Vey was having an extra-marital affair. Her intention was to use the recording for her own use, because she thought she would leave Curtis Vey if she discovered he was having an extra marital affair.

[120] Brigitte Vey testified that once she heard the recording and the conversation between Curtis Vey and Angela Nicholson, wherein they discussed killing their spouses, she played it for her son and her son called police. She went to the police station around 2:30 a.m. She testified she "handed the iPod over to police." When asked by Crown if she wanted to give the police the iPod, she said "I wanted them to listen to see if what they heard

was what we heard." She testified further, "... they could listen to it, and ... they could take it". In cross-examination, she acknowledged it was not her intention to bring the recording to police at the time she began recording Curtis Vey. Brigitte Vey confirmed in cross-examination that when she went to the police station, Cst. Russell said "I'm going to have to take this [the iPod] from you. Going to be keeping this, until we get it, at a minimum, get a copy made."

[121] Brigitte Vey also testified that it was her son who called the police, and what was conveyed to her by her son was that the police said come down and talk to us and bring the iPod. She confirmed that the police were told that she had put a recording device in the house, when she was not present, and captured a recording of a conversation between Curtis Vey and Angela Nicholson. She confirmed that police said for her to come to the police station and bring that recording with her.

[122] Constable Wierzbicki testified that he told Cst. Russell to seize the iPod. He testified he meant that Cst. Russell was to take the recording into police custody and treat it as an exhibit. He testified that when he arrived at work that morning, he had Cst. Russell's report which indicated that the recording was made illegally by Brigitte Vey and that it contained a conversation between Curtis Vey and Angela Nicholson in the Vey home. He was aware that Curtis Vey and Angela Nicholson did not know or give consent to being recorded.

[123] Constable Wierzbicki acknowledged that he had directed Brigitte Vey to bring the iPod to the police, through Cst. Russell. He testified that when he arrived at work in the morning and reviewed Cst. Russell's updated

reports, he arranged for the recording device to be taken to Regina for Tech Crimes to download the recording and transcribe the conversation. The police had the iPod at that point. He testified that he and his senior officers turned their minds to whether they needed a search warrant to download the recordings and decided they did not because "the device had been handed over by Brigitte Vey ... on her own volition." He also testified that there was "a little bit of exigency here to determine what we were dealing with." He testified they did not believe they needed a judicial authorization, even though they were aware that the surreptitious recording was of a private conversation between Curtis Vey and Angela Nicholson to which Brigitte Vey was not a party in the home of Curtis Vey. He knew that neither participant to the conversation was aware they were being recorded. The police knew neither Curtis Vey nor Angela Nicholson had given their consent to have their conversation recorded. Constable Wierzbicki also testified that they proceeded to get judicial authorization to search the homes of Curtis Vey and Angela Nicholson and to seize any computer or phones of the accused. Constable Wierzbicki testified that he assumed Brigitte Vey would be willing to assist, but acknowledged he specifically told Cst. Russell to seize the iPod. Constable Wierzbicki testified "I still believe she volunteered to turn it over. We seized it though."

[124] The Agreed Statement of Facts state:

> ...
>
> 2. As a result of this call, Cst. Joanne Russell contacted the RCMP Major Crime Unit and spoke to Cst. Dereck Weirzbicki (sp). She advised Cst. Weirzbicki (sp) that Brigette (sp) Vey had an iPod with this recording, and he directed her to seize the iPod.

> . . .
>
> 4. Cst. Russell took a statement from Ms. Vey starting at 2:54 a.m. Cst. Russell seized the iPod at 2:55 a.m. . . .
>
> 5. Cst. Russell coordinated with Cst Weirzbicki (sp) to have the recording downloaded from the iPod by Saskatchewan Technological Crimes unit.
>
> 6. The RCMP did not have a warrant to seize or search the iPod.

[125] The evidence does not support the Crown's position that Brigitte Vey voluntarily gave the iPod to the police. In fact, the Crown, in the agreed facts, admits that Cst. Russell seized the iPod.

[126] However, even if Brigitte Vey voluntarily gave the iPod to the police on July 3, 2013, that does not end the matter. Brigitte Vey owned the iPod and so it is reasonable to recognize that she could permit police access to it in her own right. In that respect Curtis Vey's and Angela Nicholson's reasonable expectation of privacy is not violated if and when Brigitte Vey exercised her right to give her iPod to police. However, the subject matter here is not the iPod itself, but rather the conversation recorded on the iPod. I have identified this earlier in the judgment, and the Crown has acknowledged that the subject matter at issue is "not the device, but the conversation recorded and stored on the iPod" (Crown brief, para. 23).

[127] The *Charter* permits police to access shared places without a warrant, when they act on the consent of a party who has a privacy interest that is equal to and overlapping with the privacy interest of the other resident. A consent search or seizure is not a "search or seizure" within the meaning of the *Charter* (*Reeves* at para 18). But again, we must focus on the subject mater

here. It is not the iPod itself. It is the conversation. Brigitte Vey owned the iPod. She had a privacy interest in the physical iPod.

[128] However, it cannot be said that Brigitte Vey had a privacy interest in the recorded conversation. Brigitte Vey illegally recorded the conversation. She was not party to the conversation. She had no privacy interest in the conversation. She had no authority to permit police to access the conversation because she had no privacy interest in the conversation.

[129] Brigitte Vey testified that she wanted police to listen to the recording. Again, assuming that she gave consent to the police to listen to the recorded conversation and even going so far as to assume that she gave police her consent to download and transcribe the recording (which is not in evidence), that does not end the matter. The Crown's position is that because Brigitte Vey gave her consent to the accessing of the conversation, its accessing and downloading is not a search or seizure within the meaning of the *Charter*. In this view, the Crown is really suggesting that when Brigitte Vey gave permission to police to access the conversation, Curtis Vey and/or Angela Nicholson's reasonable expectation of privacy was not violated because Brigitte Vey was exercising her right.

[130] I cannot agree with that proposition – that Curtis Vey and Angela Nicholson had no reasonable expectation of privacy in the conversation by reason of Brigitte Vey's actions. Even if Brigitte Vey had a privacy interest in the conversation, the consent of Brigitte Vey does not nullify the reasonable expectation of privacy held by Curtis Vey or Angela Nicholson that each would otherwise have in their private conversation. Brigitte Vey surreptitiously and illegally recorded a conversation between Curtis Vey and

Angela Nicholson. Brigitte Vey testified that she had told Curtis Vey that she had recorded him on previous occasions. Even if one were to accept that Curtis Vey was aware that he might be recorded, and took the risk that his conversation would be recorded again by Brigitte Vey, the question is not which risks the claimant has taken, but which risks should be imposed on him in a free and democratic society. It cannot be said the risk of police accessing his conversation, without a warrant, is a risk that should be imposed. In respect of Angela Nicholson, it cannot be said on the evidence that Angela Nicholson was aware of the risk or that she took the risk that her conversation would be recorded and accessed by the police. It cannot be said that either Curtis Vey or Angela Nicholson took the risk the private conversation would be accessed by the police.

[131] In *Duarte*, the Supreme Court of Canada concluded that the surreptitious electronic surveillance of a conversation by police, without a warrant, is a search and violates s. 8 of the *Charter*, even if one of the participants in the conversation had consented to the surveillance. The court in *Duarte* said further that recording of conversations must be viewed as a search and seizure in all circumstances save where all parties to the conversation have expressly consented. Here, police did not record, but they took the recording and accessed it.

[132] The Supreme Court, in *Duarte*, found that the interception of private communications by the state, with the consent of the originator, or intended recipient thereof, without private prior authorization, does infringe s. 8 of the *Charter*. The court looked to what is meant by a reasonable expectation of privacy and found that an individual may proceed on the

assumption that the state may only violate this right by recording private communications clandestinely, after it has established to the satisfaction of a judicial officer that an offence has or is being committed and that the interception stands to afford evidence of the offence. The individual's privacy is intruded on unreasonably when the state, without prior authorization, assumes the right to surreptitiously record such communications that the originator expected would not be heard by anyone, other than himself. This is the same conclusion arrived at by the Supreme Court of Canada in *R v Wiggins*, [1990] 1 SCR 62 [*Wiggins*] involving the interception of private communications on a participant consent basis, by means of an informer wearing a body pack.

[133] Also *Reeves*, the court said at para 42 and forward:

> **42** ... In reaching this conclusion, the Court distinguished between the "tattletale" risk (the risk that someone will tell the police what you said) and the risk that someone will consent to the police making an electronic record of your words (p. 48). The Court concluded that "[t]hese risks are of a different order of magnitude" – the tattletale risk is one that is reasonable to ask citizens to bear in a free and democratic society, whereas the surveillance risk is not (p. 48).
>
> **43** Similarly, while it is reasonable to ask citizens to bear the risk that a co-user of their shared computer may access their data on it, and even perhaps discuss this data with the police, it is not reasonable to ask them to bear the risk that the co-user could consent to the police *taking* this computer. In *Marakah*, this Court held that, when a claimant shares information with another person through a text message, he accepts the risk that this information may be disclosed to third parties. But that does not mean the claimant "give[s] up control over the information or his right to protection under s. 8" (para. 41).
>
> **44** I cannot accept that, by choosing to share our computers with friends and family, we are required to give up our

> *Charter* protection from state interference in our private lives. We are not required to accept that our friends and family can unilaterally authorize police to take things that we share. The decision to share with others does not come at such a high price in a free and democratic society. As the intervener Criminal Lawyers' Association (Ontario) pointed out, such an approach to s. 8 may also disproportionately impact the privacy rights of low income individuals, who may be more likely to share a home computer.
>
> **45** The Crown argues that failing to recognize Gravelle's right to consent to the taking of the computer grants insufficient protection to *her* privacy rights. It submits that privacy is not just a right to exclude, but also a right to admit. I disagree. Although the legitimate interests of third parties can, in some circumstances, attenuate a reasonable expectation of privacy (see *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, at paras. 31-34; *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211, at para. 109, per McLachlin C.J. and Fish J., dissenting, but not on this point), they cannot eliminate it. I would note that Gravelle was of course free to, and did, notify the police about what she saw on the computer. Further, while Gravelle also had a reasonable expectation of privacy in the computer data, she is not the claimant in this appeal. This Court has acknowledged that several parties can have a reasonable expectation of privacy in the same place or thing, and thus distinct s. 8 *Charter* claims (*R. v. Belnavis*, [1997] 3 S.C.R. 341, at paras. 19-25).

[134] Both *Reeves* and *Marakah* confirm that Brigitte Vey's consent did not eliminate Curtis Vey's or Angela Nicholson's reasonable expectation of privacy in the conversation.

[135] Here, Brigitte Vey illegally recorded the private conversation of Curtis Vey and Angela Nicholson. In light of the deeply intimate nature of the information in the conversation, both Curtis Vey and Angela Nicholson's subjective expectation of privacy was objectively reasonable. Brigitte Vey's surreptitious actions and consent could not nullify either Curtis Vey and/or Angela Nicholson's reasonable expectation of privacy in the conversation.

Brigitte Vey's consent, if obtained, does not equate to there being no search or seizure of the conversation.

[136] Brigitte Vey cannot waive Curtis Vey and/or Angela Nicholson's *Charter* rights. The Crown's argument in this respect would effectively permit a person, who is not party to a conversation, to illegally record it and to waive the privacy rights of the legitimate parties to the conversation. This is totally inconsistent with the jurisprudence and especially the Supreme Court's decisions in *Cole, Marakah* and *Reeves*. In *Cole*, the court considered whether the first-party consent doctrine should be extended to third parties. The court rejected third party consent, indicating that this doctrine would be inconsistent with the court's jurisprudence which requires consent to be "voluntarily given by the rights holder" and "based on sufficient information in his or her hands to make a meaningful choice" (*Cole* at paras 77-78 and *Reeves* at para 50). Brigitte Vey is not entitled to relinquish Curtis Vey or Angela Nicholson's constitutional rights against search and seizure. Waiver by Brigitte Vey does not constitute waiver for Curtis Vey or Angela Nicholson. Allowing Brigitte Vey's consent to waive Curtis Vey's or Angela Nicholson's rights is completely inconsistent with Canadian jurisprudence.

[137] The Crown also argued that to reject its arguments on this issue would interfere with criminal investigations and law enforcement. But, as was indicated in *Reeves*, *Charter* rights often do. Judicial pre-authorization protects the unique and heightened privacy interests in the subject matter, while allowing lawful criminal investigations.

[138] I have identified earlier, in analyzing standing, that Curtis Vey and Angela Nicholson each have a reasonable expectation of privacy in the

subject matter. If an individual's reasonable expectation of privacy has been infringed, a s. 8 search or seizure has occurred. Here, the accessing, downloading and transcribing of the conversation was a search or seizure. The taking of the conversation by the police was a warrantless search or seizure (*Cole, Reeves* and *Marakah*).

[139] The Crown argues that if there was a search or seizure, it was reasonable because there were exigent circumstances here, sufficient to justify the accessing and downloading of the conversation without a warrant. In exigent circumstances, police may conduct warrantless seizures and searches. Exigent circumstances refer to an urgent situation arising from circumstances that warrant immediate police action; an urgent or critical situation. The doctrine of exigent circumstances is one which may ultimately determine whether a search and seizure are unreasonable under s. 8 and also whether the evidence thereby obtained should be excluded under s. 24(2) of the *Charter*.

[140] If there is a genuine fear that evidence of a crime will be lost, this can constitute the necessary exigent circumstances for a warrantless search. In *R v White*, 2007 ONCA 318, 155 CRR (2d) 146 [*White*], a cell phone the accused was speaking on was seized during an investigative detention. The court held that the right of seizure is not limited to situations of immediate danger, but also to reasonably apprehended potential danger. The court found in *White* that the police did not have to wait to seize the accused's cell phone.

[141] In *R v Paterson*, 2017 SCC 15, [2017] 1 SCR 202 [*Paterson*], Justice Brown summarized the law relating to exigent circumstances, in the context of drug-related searches, and s. 11(7) of the *Controlled Drugs and Substances Act*, SC 1996, c 19, as follows at para. 33:

> **33** The common theme emerging from these descriptions of "exigent circumstances" in s. 11(7) denotes not merely convenience, propitiousness or economy, but rather urgency, arising from circumstances calling for immediate police action to preserve evidence, officer safety or public safety. ...

[142] The question of whether exigent circumstances exist in a given case is a finding of fact for the trial judge (*Feeney*). Here, Cst. Wierzbicki testified that he directed Cst. Russell to seize the iPod. He also testified that he and other senior officers decided they did not need a warrant to download the contents of the iPod – (the subject of the matter of the search - the conversation) and that "there was a little bit of exigency here to determine what we were dealing with".

[143] Here, there may have been exigent circumstances to seize the iPod, so as to preserve evidence. That seizure could be said to be justified because of exigent circumstances, for the preservation of evidence. But, the seizure of the iPod is distinct from searching the device and downloading the conversation. And again, one must focus on the subject matter of the search – the conversation. So the question is whether there were exigent circumstances in relation to the accessing and downloading of the conversation.

[144] Here, police immediately accessed and downloaded the conversation. This appears to have begun on July 3 or 4, when Cst. Wierzbicki sent it to Tech Crimes. Constable Wierzbicki testified there was exigency. However, Cst. Wierzbicki did not ask Cst. Russell to call him back in the early morning hours of July 3, once she had spoken with Brigitte Vey. He told her to get back to him the next morning. Constable Wierzbicki testified that no surveillance was put on Curtis Vey and Angela Nicholson until July 6. The evidence as that the Major Crimes team collectively felt that surveillance was

not required immediately. Major Crimes assessed Brigitte Vey and Jim Taylor's safety level and felt that the situation did not require immediate surveillance of the accused for the public safety. It appears there was a definite decision by the police that there were no exigent, reasonably apprehended potential danger to Brigitte Vey and Jim Taylor. The police did not put surveillance on the accused persons until they effected the arrests, three days later. There was no issue of exigent public safety or exigent safety of the alleged victims of this alleged conspiracy. The police proceeded to obtain judicial authorizations to search the homes and seize various computers and cells phones of the accused persons. Those were effected on July 6, three days later at the time of the arrests. Surveillance was placed on the accused persons on July 6, only one hour before the search warrants and arrests of the accused were effected.

[145] There is no evidentiary basis to satisfy me that there were exigent circumstances, such that the accessing or downloading of the conversation was reasonable without a warrant. The accessing and downloading was not to preserve evidence. The police had the iPod in their possession. The evidence was preserved and could not be lost. There was no issue of officer safety. The only possible exigent circumstances was public safety. However, the evidence does not support such exigent circumstances. The intentional conduct and actions of the police indicate there were no exigent circumstances which justified the search and seizure of the conversation without a warrant. Once the iPod was seized, there was no exigent circumstances and the police were not acting out of any reasonable concerns about imminent harm. I am not satisfied on the evidence that there were exigent circumstances such that the search of the iPod (the accessing and downloading) was reasonable.

[146] For all of these reasons, the accessing and downloading of the conversation, without Curtis Vey's consent and without Angela Nicholson's consent, and without a warrant, interfered with each of their reasonable expectation of privacy and thus constituted an unreasonable search or seizure within the meaning of the *Charter*. This warrantless search or seizure was not reasonable, and it was not authorized by any law.

[147] The search and seizure of the iPod recording violated both Curtis Vey's rights and Angela Nicholson's rights under s. 8 of the *Charter*. The conversation is presumptively inadmissible against Curtis Vey and presumptively inadmissible against Angela Nicholson's, subject to s. 24(2) of the *Charter*.

D. Should the Evidence Be Excluded Under Section 24(2) of the *Charter*?

[148] Section 24(2) provides that where evidence is obtained in a manner that infringed *Charter* rights, it shall be excluded "if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute." In this s. 24(2) analysis, courts must consider (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the *Charter* protected interests of the accused; and (3) society's interest in the adjudication of the case on its merits (*R v Grant* at para 71 and *Reeves* at para 59).

(1) Seriousness of the *Charter*-Infringing Conduct

[149] The court's task in considering the seriousness of the *Charter*-infringing state conduct is to situate that conduct on a scale of culpability. In

Grant, the Supreme Court noted at para. 74 that admission of evidence obtained through inadvertent or minor violations may minimally undermine public confidence in the rule of law, but admitting evidence through a wilful or reckless disregard of *Charter* rights would have a negative effect on the public confidence in the rule of law. As stated by Richards C.J.S. in *R v Loewen*, 2018 SKCA 69, 365 CCC (3d) 91 [*Loewen*]:

> **69** As indicated, the first line of inquiry under the s. 24(2) analysis obliges a consideration of whether admitting the evidence in question would send a message to the public that the courts "effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct" (*Grant* at para 72). The more severe or deliberate the police conduct in issue, the greater the need to exclude the evidence.

[150] The Crown, here, argues that the police here were acting in good faith. The Crown identifies that the police obtained warrants for searches of computers and cellphones in the accused's homes, which shows good faith. But because Brigitte Vey brought the iPod voluntarily, they decided a warrant was not needed to access or download the conversation. This, the Crown says, is good faith.

[151] Good faith on the part of the police will reduce the need for the court to disassociate itself from police conduct, but good faith errors must be reasonable (*Buhay*). The Supreme Court has cautioned that negligence in meeting *Charter* standards cannot be equated to good faith (*Grant* at para 75).

[152] Here, I am of the view that the *Charter*-infringing state conduct was serious. While Cst. Wierzbicki may have believed that Brigitte Vey gave her consent to the seizure of the iPod, and allowed the police to take it, there

was no authorization or consent from Brigitte Vey to download the conversation. More importantly, Brigitte Vey could not give such consent. Constable Wierzbicki testified that he knew that he could not just get Brigitte Vey's permission to go and search the residence she shared with Curtis Vey, nor to seize and search Curtis Vey's computer or cell phones. He knew he needed to obtain judicial authorization in that regard. Constable Wierzbicki and police should have known that a third party cannot waive the privacy rights of another party to a private conversation, which took place in the home of one of the conversation participants. Constable Wierzbicki was one of a task force of RCMP Major Crimes North. Major Crimes was a specialized unit involved in judicial authorizations and search warrants. Further, the iPod was sent to the Tech Crimes Unit in Regina. Both of these units were specialized units, and each should have been aware of the unique and heightened privacy interests of Curtis Vey and Angela Nicholson in the private, illegally recorded conversation. The police knew, prior to listening to the conversation and prior to accessing it and downloading it, that the conversation was recorded by Brigitte Vey surreptitiously and without the consent of Curtis Vey or Angela Nicholson. Constable Wierzbicki testified he was aware that private citizens are not able to legally record the conversations of third parties. Constable Wierzbicki and police knew that the conversation was recorded surreptitiously and illegally in the home of Curtis Vey and that the two parties to the conversation were Curtis Vey and Angela Nicholson.

[153] The Crown also argued that I must consider the seriousness of the state conduct, based on the law at the time of the breach. At the time of the breach, the Crown argues the Supreme Court had not decided *Marakah* or *Reeves*. This is true. But, the police knew, or should have known, that

recording the private conversations of people, without their consent, was illegal, whether it was done by the police or by a private citizen. That law has not changed.

[154] As well, the Supreme Court of Canada's decision in *Wong* (1990), *Duarte* (1990), *Wiggins* (1990), *Edwards* (1996) and *Tessling* (2004), each of which dealt with s. 8 and issues similar to the ones here respecting the reasonable expectation of privacy, were well established. In *Duarte*, the court stated that a surreptitious electronic recording of a private conversation amounts to a search and seizure unless all parties to the conversation have expressly consented to it being recorded. As well, the decisions in *Silveira* (1995), *Feeney* (1997), and *Morelli* (2010) all identified the very high expectation of privacy associated with a person's home. In October, 2012, the Supreme Court released its decision in *Cole*. That decision identified that the police infringed the accused's rights under s. 8 of the *Charter* when it searched, without a warrant, the accused's work-issued laptop. The court held there was an objective reasonableness of the accused's subjective expectation of privacy. While the principal in *Cole* had a statutory duty to maintain a safe school environment, and, by necessary implication, a reasonable power to seize and search a school-board issued laptop, the lawful authority of the accused's employer to seize and search the laptop did not furnish the police with the same power. The court, in *Cole*, held that a third party cannot validly consent to a search, or otherwise waive a constitutional protection, on behalf of another. The school board was legally entitled to inform the police of its discovery of contraband on the laptop The police, in *Cole*, were not entitled to search the laptop without a warrant. In *Cole*, the Supreme Court rejected third

party consent. This was established law at the time police accessed the conversation here.

[155] The police officers making the decisions here were part of specialized units (Major Crimes and Tech Crimes). They had specialized education and training in respect of obtaining judicial authorization before accessing and downloading the conversation. Yet they dismissed the need for a warrant quickly. The evidence cannot support a conclusion of good faith. The police recklessly disregarded both of the accused's rights. The specialized expertise of the Major Crimes Unit and Tech Crimes Unit, who made the decision to conduct a warrantless search and seizure of the conversation, make the conduct of police in respect of the s. 8 violation more serious.

[156] Here, the police had the iPod in their possession. There were no exigent circumstances. They took several days to put surveillance on the accused persons, and to obtain and execute search warrants of the accused's homes and technological equipment. The accessing and downloading of the conversation without a warrant, lacked any reasonable pretext of lawful authority. This breach was a wilful or reckless disregard of *Charter* rights. Allowing the admission of an illegally recorded private conversation between two private individuals, that occurred within the confines of one of those individuals' homes, will have a significant negative effect on the public confidence in the rule of law. The police committed a serious breach of the *Charter* in accessing and downloading the conversation. The conduct lacked a reasonable pretext of lawful authority. In respect of both Curtis Vey and Angela Nicholson, the conduct of the police in accessing and downloading the

conversation stored on the iPod is sufficiently serious to favour the exclusion of the evidence.

(2) Impact of the *Charter*-Infringing Conduct on Curtis Vey's and/or Angela Nicholson's' *Charter*-Protected Interests

[157] The second line of inquiry under the s. 24(2) analysis focusses on whether the admission of the evidence would bring the administration of justice into disrepute from the standpoint of society's interest in respect for *Charter* rights. This entails considering the degree to which a *Charter* infringement undermined the *Charter*-protected interest. In *Grant* at para 76, the Supreme Court said:

> **76** The impact of a *Charter* breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute. ...

[158] As indicated in *Paterson* at para 49, where a *Charter*-protected interest in privacy is at stake, as it is here, infringements arising from circumstances denoting a "high expectation of privacy" tend to favour exclusion of evidence, while, all other considerations being equal, infringements of lesser interests in privacy will not pull as strongly towards exclusion. *Grant* at para 78 stated: "... An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy ... is more serious than one that does not."

[159] Here, Curtis Vey was in his own home, which was on a farm. He lived there alone with Brigitte Vey and she was at work on the date in

question. Brigitte Vey surreptitiously recorded his conversation, by placing the iPod in a spot that he would not be able to see it. She purchased a new iPod to further disguise that she was illegally recording him. Curtis Vey would have had a high expectation of privacy about his private conversations within his own home.

[160] It is well established that activities that are conducted within one's home, which has been described as a bastion of personal privacy throughout the history of the common law, fall to the very centre of the zone of personal privacy (*Tessling* at para 22). The courts have been especially sensitive to an individual's expectation of privacy within their residences. The right to a high expectation of privacy with respect to one's dwelling was confirmed by the Supreme Court in *Silveira*. In *Morelli*, Justice Fish, writing for the majority, also emphasized the importance with which courts must treat the privacy expectations of an individual in his or her home.

[161] While the police were not the authors of the surreptitious recording, they accessed it and downloaded it, knowing it had been surreptitiously recorded, once it came into their possession. The state conduct had a serious impact on Curtis Vey's *Charter*-protected interest. It matters not that the information may reveal only certain activities, or that the activities revealed are criminal" (*Spencer*). It is difficult to imagine a search more intrusive, extensive or invasive of one's privacy, than the police accessing and downloading of an illegal and surreptitious recording of a private conversation, given the extremely private nature of the conversation. It is even more intrusive, invasive and extensive when the private conversation was conducted in Curtis Vey's own home. The impact of the *Charter*-infringing

conduct by the police on Curtis Vey's *Charter*-protected interest was significant and favours exclusion.

[162] Turning to Angela Nicholson, it is true that Angela Nicholson was not in her own home when the conversation occurred. She was in the home of Curtis Vey, the man with whom she was conducting an extra-marital affair. They were alone in the home, discussing their private matters. Angela Nicholson may have a diminished privacy interest (as compared to Curtis Vey) because it was not her home where the conversation took place, and the impact of that must be assessed accordingly. Even so, to argue against the evidence's exclusion on this basis would be to re-introduce, at the s. 24(2) stage, the very sort of risk analysis that the Supreme Court rejected in *Duarte*. It cannot be that the impact on an accused's *Charter*-protected interests is so less serious when a private conversation is illegally recorded in someone else's home than when the same conversation, in which that same accused has the same *Charter*-protected interest – is illegally recorded in one's own home. It is the conversation that is protected. The conversation still took place in a private place and is a private conversation to which people have a high and reasonable expectation of privacy. If it were sufficient to negate the impact of an illegal search of that conversation, because the conversation did not occur in the home of Angela Nicholson, then this factor would tend to favour the admission of the evidence in every case where an illegal recording of a conversation has been taken by any person and then searched and seized by police. This can only undermine the very privacy interest that s. 8 of the *Charter* protects.

[163] The degree to which this *Charter* infringement undermines the *Charter*-protected interests at stake here, is significant. Again, it is difficult to imagine a search more intrusive, extensive, or invasive of one's privacy than the search and seizure by accessing, downloading and transcribing of an illegally and surreptitiously obtained recording of a private conversation within the confines of a private home, given the extremely private nature of the information that the conversation might contain. The impact of the *Charter*-infringing conduct on Angela Nicholson's *Charter*-protected interest was significant and favours exclusion.

[164] The impact of the *Charter*-infringing conduct by the police on Curtis Vey's and on Angela Nicholson's interest was significant and favours exclusion in respect of each.

(3) Society's Interest in an Adjudication of the Case on Its Merits.

[165] The final consideration is the effect of admitting the evidence on the public interest in having the case adjudicated on its merits. This entails considering the reliability of the evidence and its importance to the Crown's case. The Crown asserts this is the "crux of the Crown's case." The Crown submits that this factor favours inclusion of the evidence, because it is reliable evidence, as it is the words of Curtis Vey and Angela Nicholson, coming directly from them.

[166] Richards C.J.S., in *Loewen*, commented on this consideration:

> **86** The third aspect of the *Grant* analysis is the public interest in having a case adjudicated on its merits. The trial judge dealt with this issue by writing as follows:

> [71] It is always the case that society would like to see criminal allegations tried on the basis of their merits. This has the effect of punishing the guilty while exonerating the innocent. However, society also has an interest in upholding *Charter* rights. Further, as Cromwell J. noted in *R v Côté*, [2011] SCJ 46, if the first two branches of the *Grant* analysis show serious violations, then the factors on the third branch such as the seriousness of the offence, the reliability of the evidence and the importance of that evidence to the Crown's case should not be determinative. I have not found that to be the case here in any event.

> **87** I take the trial judge to have meant that, because the first and second branches of the *Grant* test did not call out for the evidence to be excluded, the public interest in seeing the charges adjudicated should be taken to tip the balance in favour of admitting the evidence.

> **88** The drugs and cash in issue here are, of course, highly reliable evidence and essential to the determination of the charges against Mr. Loewen. The problem posed by illegal drugs in the lives of Saskatchewan communities is well known and the damaging role played by drug traffickers in all of that needs no explanation. There is a significant public interest in seeing the charges against Mr. Loewen adjudicated on their merits.

> **89** That said, I agree with the Court of Appeal for Ontario's caution that the public's interest in a successful prosecution should not be resorted to in a systematic way to require the admission of evidence acquired through a breach of *Charter* rights. See: *Mhlongo* [*R v Mhlongo*, 2017 ONCA 562, 355 CCC (3d) 1] at para 77; *R v Gonzales*, 2017 ONCA 543 at para 157, 136 OR (3d) 225. As Brown J. wrote in *R v Paterson*, 2017 SCC 15 at para 56, [2017] 1 SCR 202, it is important not to allow society's interest in adjudicating a case to trump all other considerations.

[167] The charges against these accused are very serious. I agree with the Crown's submissions that the evidence seized from the recording is highly reliable. The Crown has stated this evidence is essential to the Crown's case

against the accused. This factor strongly supports admitting the evidence, notwithstanding the infringement of the accused's s. 8 *Charter* rights.

(4) Should the Evidence Be Excluded?

[168] The police conduct here was seriously troubling. The police committed a serious breach of both accused's s. 8 rights. The impact of the s. 8 infringement on Curtis Vey and on Angela Nicholson's interests protected thereunder was considerable, intruding into a place (their conversation) in which both he and she were entitled to repose the highest expectation of privacy. On the other hand, the value of the evidence to deciding the truth of the charges against each accused is also considerable.

[169] The balancing mandated under s. 24(2) is qualitative in nature. The effective destruction of the Crown's case weighs heavily, but so does the warrantless search by police of a private conversation, when police knew that the conversation was illegally recorded. As indicated in *Grant* at para 84:

> **84** ... the "seriousness of the alleged offence . . . has the potential to cut both ways... [W]hile the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high."

[170] It is clear that the jurisprudence identifies that it is important to not allow the third factor of society's interest in adjudicating a case on the merits to trump all other considerations, particularly where the impugned conduct was serious and worked a substantial impact on the accused's Charter rights (Paterson at para 56).

[171] Justice Doherty in *R v McGuffie*, 2016 ONCA 365, 336 CCC (3d) 486, has articulated the public interest in maintaining a justice system which is "above reproach' at para. 73:

> **73** ... One the one hand, if the evidence at stake is reliable and important to the Crown's case, the seriousness of the charge can be said to enhance society's interests in an adjudication on the merits. On the other hand, society's concerns that police misconduct not appear to be condoned by the courts, and that individual rights be taken seriously, come to the forefront when the consequences of those whose rights have been infringed are particularly serious .... [citations omitted.]

[172] The public interest in the principles governing the authority of the police, the presumptive unreasonableness of warrantless searches, and the high privacy interest attaching to private conversations, in a person's residence and/or in a private place, are fundamental to our understanding of the proper relationship between citizens and the state. I cannot help but conclude that the admission of an illegally recorded private conversation, which occurred in a private home, and was then seized, accessed and downloaded by the police through a warrantless search, would bring the administration of justice into disrepute.

[173] Having considered these factors separately and together, I am of the view that the evidence obtained as a result of the police accessing and downloading of the surreptitiously recorded private conversation on the iPod should be excluded as against Curtis Vey and Angela Nicholson, as its admission would bring the administration of justice into disrepute.

CONCLUSION

[174] I exclude the evidence obtained from the search and seizure of Brigitte Vey's iPod in respect of Curtis Vey and Angela Nicholson.

J.
C. L. DAWSON